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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92048879
Party	Plaintiff NOR-CAL BEVERAGE CO., INC.
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IN THE UNITED STATES TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Reg. No. 2,227,005

Trademark: GO GIRL

NOR-CAL BEVERAGE CO., INC. Petitioner And Counterclaim Defendant, v. IRENE J. ORTEGA, dba GOGIRL ACTIVEWEAR Respondent And Counterclaim Plaintiff.	)	Cancellation No. 92048879

PETITIONER'S REPLY BRIEF

PETITIONER NOR-CAL BEVERAGE CO., INC. (hereinafter, "NOR-CAL"), hereby submits its REPLY BRIEF in support of its pending MOTION FOR LEAVE TO FILE AMENDED PETITION FOR CANCELLATION.

A. Respondent Has Failed To Establish Undue Prejudice

RESPONDENT IRENE J. ORTEGA (hereinafter, "ORTEGA") claimed in her Opposition Brief, that she will suffer undue prejudice if leave is granted to file NOR-CAL'S AMENDED PETITION FOR CANCELLATION. ORTEGA'S stated grounds for undue prejudice are: (1) the present Motion "is brought late in the proceedings (just prior to close of discovery period)"; and, (2)

and that she will incur fees and costs in connection with defending this Petition. (See, Respondent's Opposition, pages 1 and 5). Both of these grounds lack merit.

Petitioner NOR-CAL set forth in its Motion For Leave, the specific facts and circumstances regarding the timing of its discovery of evidence which supports the additional factual grounds for Count I (Abandonment) and Count II (Fraud). Respondent does not set forth any basis why the timing of NOR-CAL's Motion, brought before the end of discovery, causes her undue prejudice. In fact, leave to amend is more freely allowed when the proceeding is still in the discovery stage, as is the instant proceeding, such that any resulting prejudice is lessened. ***See, Microsoft Corp. v. Quantel Business Systems, Inc.***, 16 USPQ 2d 1732, at 1733-1734 (TTAB 1990)(Undue prejudice will not result from amendment of cancellation petition where proceeding is still in the discovery stage).

Moreover, the Board can mitigate any prejudice to the adverse party by enlarging or reopening the discovery period in order to allow the adverse party adequate time to conduct discovery pertaining to the new issues raised by the amendment to the pleading. ***See, Anheuser-Busch, Inc. v. Martinez***, 185 USPQ 434, at 435 (TTAB 1975)(Motion to amend granted after discovery was closed, but before testimony period had began, and discovery period was reopened by Board).

The second ground of alleged undue prejudice, namely, that Respondent will incur fees and costs in connection with defending the Amended Petition For Cancellation, is frivolous. If that were a legitimate ground for denying leave to amend, such leave would always be successfully opposed by the adverse party. Not surprisingly, Respondent has cited no authority in support of such a proposition.

B. <u>Respondent Confuses Right To Assertion Of Claim With Proof Of Claim</u>

The issue underlying any Motion For Leave To File an amended pleading is not whether the evidence ultimately will support the claim sought to be added, but whether the moving party should be allowed to assert the claim at trial or on summary judgment. The question of whether the moving party can prove the allegations in the amended pleading is a matter to be determined after the introduction of evidence during the testimony period. ***Flatley v. Trump***, 11 USPQ2d 1597 (TTAB 1989). Nevertheless, throughout her Opposition to the instant Motion, Respondent ORTEGA repeatedly confuses NOR-CAL'S right to assert Counts I and II, with an alleged lack of "evidence in the record" to support such claims.

As to Count I, NOR-CAL'S counsel voluntarily offered to provide ORTEGA'S counsel with documents which support the new factual allegations in the proposed pleadings, so he could assess whether or not to oppose the Motion For Leave To Amend. (See, pages 2 and 3, PETITIONER'S MOTION FOR LEAVE TO AMEND). Inexplicably, ORTEGA'S counsel didn't even reply to the offer of NOR-CAL'S counsel to provide copies of these supporting documents. But now ORTEGA complains that there are no allegations in the pleadings or "supporting evidence" that the registration in issue was sold to RCL Investments, Inc.

In any event, it is not NOR-CAL'S burden in seeking to amend a pleading to provide or "make of record" any evidence in support of the pleadings**.** ***See, Anheuser-Busch, supra***, at 435 ("As to opposer's argument that applicant has not filed an affidavit or other proofs in support of its proposed allegation of prior use in the United States, there is no requirement in the appropriate rules that pleadings be supported by any proofs prior to the taking of testimony and the submission of any other evidence during the trial period of the case.").

Similarly, as to Count II, ORTEGA attempts to "make of record" alleged evidence which she contends supports her usage of the GO GIRL trademark in connection with "leggings" and "sweatpants", during the relevant period before she filed the §§ 8 and 15 Affidavits. NOR-CAL, which had already reviewed these documents before filing its Motion, disputes their relevance and probity. But the instant Motion is not about the quantum or quality of evidence which the Board will admit or consider at trial. As the Board noted in ***Anheuser-Busch***, "Both parties will have ample opportunity to prove the allegations asserted by them in their pleadings during the regularly scheduled times for taking testimony which will subsequently be allotted to each." ***Id.***

C. <u>Respondent Has Failed To Challenge The Legal Sufficiency Of The Amended Pleading</u>

In its Motion For Leave To Amend, Count I, NOR-CAL specifically recited new facts contained in ¶¶ 7-12 of the AMENDED PETITION TO CANCEL, which state, ***inter alia***, that pursuant to a contract which was entered into between Girl World Sports, Inc. and RCL Investments, Inc., and subsequently approved by the Bankruptcy Court in Texas on June 9, 2000, assets including the name Girl World Sports and all goodwill associated therewith [and] all copyrights and trademarks connected to that entity were purchased by RCL Investments, Inc.

Thus, the registration for GO GIRL, for which ORETGA claims ownership, had already been sold to a third-party more than a year prior to the alleged subsequent transfer of same to ORTEGA. The pleading is simple and straightforward: If good title in the GO GIRL registration passed to a third party a year before the assignment to ORTEGA occurred, then no good title in that registration could subsequently pass to ORTEGA.

ORTEGA may blindly question the sufficiency of NOR-CAL'S evidence which she has

never seen, but she does not challenge the legal sufficiency of the Amended Pleading itself. Instead, the Board is served up an entirely irrelevant notion: ORTEGA obtained an opinion of an unnamed attorney in Texas, who gave to her an opinion which ORTEGA did not make of record, which purportedly interprets Texas corporate law, to support ORTEGA'S position that Girl World Sports, Inc. could theoretically transfer assets to her. However, it is the Board, not an unnamed attorney hired by ORTEGA, who will decide what law to apply in assessing the legitimacy of the second assignment of the registration, executed by Girl World Sports, Inc.

More importantly, ORTEGA'S Opposition assiduously avoids the obvious question: How could Girl World Sports, Inc. transfer an asset to ORTEGA which it no longer owned because it had previously been sold to a creditor, pursuant to the Bankruptcy Court's Orders? ORTEGA does not challenge the legal premise that the same asset cannot be sold twice by the same party, and pass good title to the latecomer. NOR-CAL submits that its amended Count I is legally sufficient, and that ORTEGA has made no serious challenge to that legal sufficiency in her Opposition.

Regarding Count II, NOR-CAL has pleaded with the specificity required by Rule 9(b), a claim for fraudulent maintenance of the GO GIRL registration. ORTEGA does not challenge the legal sufficiency of the pleading. Instead, ORTEGA attempts to argue that she has evidence that disputes the claim of fraud. Under the case law authority cited above, there is no requirement that NOR-CAL submit evidence with its pleading; only that the pleading itself be specific enough in its factual assertions, to satisfy the requirements of Rule 9(b). That requirement is satisfied.

CONCLUSION AND ORDER REQUESTED

Petitioner NOR-CAL submits that in view of all the foregoing facts and circumstances and

the applicable law, the AMENDED PETITION TO CANCEL is not unduly prejudicial to Respondent, was brought in timely fashion, and is legally sufficient. Accordingly, Petitioner respectfully requests that leave to file its AMENDED PETITION TO CANCEL be granted, and that all existing discovery and trial deadlines, including Testimony Periods, be reset in accordance with Board practice.

Respectfully submitted,

Dated: May 7, 2009
Sacramento, California

/R. Michael West/
R. Michael West
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NOR-CAL BEVERAGE CO., INC. Petitioner And Counterclaim Defendant, v. IRENE J. ORTEGA, dba GOGIRL ACTIVEWEAR Respondent And Counterclaim Plaintiff.	Cancellation No. 92048879 **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the document described following:

PETITIONER'S REPLY BRIEF.

was mailed on the date set forth opposite my signature, by First Class Mail, postage prepaid, and addressed as follows:

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Dated: May 7, 2009

/Lee Chase/
Lee Chase